

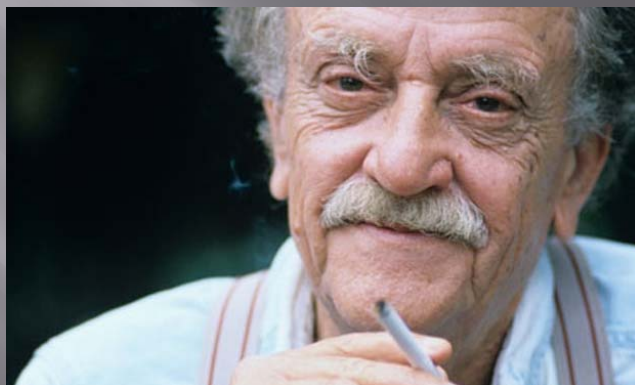
AGE DISCRIMINATION IN LIGHT OF THE CJEU CASE LAW

ERA, Zagreb, 11-12 May 2017
Helen Meenan,
Visiting Professor Kingston University,
United Kingdom

 This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Preliminary notes

- 1) Thank you to ERA
- 2) So why are we here?



Savio/retna

Where are we now?

- 16.5 years since adoption of Directives 2000/78 and 2000/43
- **Scope:** Both Directives apply to **public and private sectors** but,
- **Race = Employment + social protection and social advantages, education, and goods and services available to the public, including housing.**
- **Age, sexual orientation, religion or belief, disability = employment only**

Other grounds - more fields?

- But if / when adopted European Accessibility Act will improve accessibility to certain products+ Services (e.g. e-commerce) for **disabled persons**, this is an 'internal market' proposal (Art.114 TFEU)
- Note also: Directive 2004/113/EC of 2004 equal treatment between **men and women** in the access to and supply of **goods and services** also adopted under Art. 13(1) EC Treaty, **now Art. 19 TFEU**

Age - future developments?

- Draft Directive on equal treatment between persons irrespective of religion or belief, disability, **age** or sexual orientation **other than in the field of employment and occupation** {SEC(2008) 2180} {SEC(2008) 2181} BUT stuck in Council...
- 2010 UN Open-Ended Working Group on **Ageing** (OEWG) considering proposals for an international legal instrument to promote and protect the rights and dignity of older persons...implications for age discrimination?

Comparing age with the other 'grounds' in Dirs. 2000/78 + 2000/43

Cases of the CJEU on Dir. 2000/78 + 2000/43
(up to 7 April 2017)

- 'Racial' / Ethnic origin 5,
- Age 38,
- Disability 8,
- Sexual Orientation 6,
- Religion and beliefs 2,
- other 2
- Total = 61
- Age = 38 cases out of 61
- Age = 61.6% of discrimination cases under Dir. 2000/78 and Dir. 2000/43

Note: increase from 58% in October 2015

Why so many 'age' references?



- **Note:** common concepts across all grounds (and addition of "reasonable accommodation" for disability) but
- 'age' → common concepts + 'without prejudice' fields + optional exceptions + Art. 6.1 justification for age discrimination
- Very widespread use of age as an 'acceptable' work, training, social policy 'organisational' tool pre-dating the Directive (and continuing) e.g. in collective labour agreements, Labour Codes, Income Tax laws etc... but now must comply with **Art. 16 Dir. 2000/78**
- Everyone has an age and it is always changing, you can grow into discrimination!
 - But take care**
 - 20 years added to our life span since 1950 (UN, 2002). Are some age limits now out of date?
 - Age has greatest potential to intersect with other grounds and beware of stereotypes!

Continued...

- Older people are not a homogenous group.
- “it is axiomatic in gerontology that most general physiological and biological functions in older persons tend to have greater variation than in younger persons, related to greater variation in age-related change ... It is this variation that provides the basis for the observation that function and performance often do not correlate very well with chronological age (Masuo et al., 1998)”, National Research Council and the Institute of Medicine, David H. Wegman and James P. McGee, Editors, *Health and Safety Needs of Older Workers*, (Washington DC, 2004)
- There are far greater functional variations between workers of the same age than between workers of different ages, C. Oswick, et al. *Equality, Diversity and Disadvantage in Employment* (Palgrave, 2001) p. 9

Note: following apply to all grounds in Dir. 2000/78 -

- **Art. 2(2)(b) indirect discrimination** = where an apparently neutral provision, criterion or practice would put persons having a... particular age... at a particular disadvantage unless it is objectively justified by a legitimate aim + the means of achieving that aim are appropriate and necessary.
- **Article 2.5** Dir. is without prejudice to national measures necessary for public security, maintenance of public order, the prevention of criminal offences, protection of public health and the protection of the rights and freedoms of others *continued...*

Continued...

➤ Article 4

M States may provide that a difference of treatment “**based on a characteristic related to any of the grounds**” shall not be discrimination if, due to nature of the occupational activities or context in which they are carried out, the characteristic = **a Genuine and Determining Occupational Requirement** → objective must be legitimate + requirement must be proportionate

Article 6.1 Justification of age discrimination

3 steps-

- is there a difference in treatment on grounds of age if yes,
- is it “objectively and reasonably justified” by a legitimate aim (employment policy, labour market, vocational training) within national law?
- Are the means of achieving the aim “appropriate and necessary”?

Examples of permitted exceptions for age

- **Art. 3(4)** M States may provide that this Directive, in so far as it relates to discrimination on grounds of disability and age, shall not apply to the armed forces.
- **Article 6.2** M. States may provide that ages for admission or entitlement to **occupational social security schemes** or entitlement to **retirement or invalidity benefits**...and use of ages in actuarial calculations does not = Age Discrimination as long as it does not amount to sex discrimination

Recent cases (to 7 April 2017)

- Case C-432/14, 1 October 2015 **O** (young people, no end-of-contract payment for vacation work)
- Case C-441/14, **DI v Estate of KE Rasmussen** (dispute private persons, role of national court where national law contrary to directive)
- Case C-122/15 **C** (higher taxation of pension income than earned income → not within scope)
- Case C-159/15, 16 June 2016 **Lesar** (pension rights, non-inclusion of work periods before age 18, **Art. 6(2)** Dir.2000/78)
- Case C-548/15 **de Lange** (deduction of training costs from income tax for pilots aged under 30, **Art. 6(1)**) *Continued...*

- Case C258/15, 15 November 2016, **Sorondo** (police officers must be less than 35 at recruitment, Arts. 4(1) and 6(1)(c) Dir. 2000/78)
- (Case C-443/15, 24 November 2016, **Parris** (o. pension scheme, civil partnership before age 60, discrimination on grounds of sexual orientation or age, or combination of them)
- Case C-539/15, 12 December 2016, **Bowman** (collective agreement, inclusion of schooling + extension of advancement from first to second salary step)

Some observations on today's cases-

- Overall repetition of a range of same/v similar legal issues → appears very much a case by case examination, dependent on facts of each case
- Patience of CJEU in receiving references on 'age'
- This phase: some cases searching for the boundaries of the Directive and, others refining its scope?
- Note: all male applicants!
- "The proliferation of recent age discrimination cases tend to focus on older men of the dominant ethnic community". (Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law*, (European Union, Luxembourg, May 2016)

Case C-432/14, 1 October 2015, O

- O, a student worked 4 days in December 2010
- end-of-contract payment not payable for a young person during school or university vacation (Code du Travail)
- Q. was this law precluded by g.p. of non-discrimination on grounds of age, where young person not offered social security or permanent employment at the end of the contract?
- O was related to the managers of the defendant, likely aim of dispute to challenge provisions
- CJEU case admissible even though fictitious and real purpose is not to obtain payment sought...

- As contract had been performed and its application raises a question of interpretation of EU law, CJEU bound by consistent case law to give a ruling (except in certain circumstances...) paras. 18 & 19
- European Commission asked if he may be classified as a 'worker'?
- CJEU: 'worker' must not be interpreted narrowly
- "the possibility cannot be ruled out that ...that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of 'worker'". For the national court to analyse all the factors, paras. 24-26
- If he is a worker...is the situation of a student **directly comparable** to that of workers entitled to end-of-contract payment at the end of a fixed term contract (FTC), in light of the aim pursued ("to compensate for the insecurity of his situation")?

- CJEU: national legislature considered those young persons were not in a situation of job insecurity and, not comparable and, it did not exceed its discretion
- Difference in treatment was not discrimination on grounds of age

- Compare with **Kratzer Case C423/15, 28 July 2016** Mr K claimed discrimination by reason of **age** and **sex**, his application was rejected for advertised post, trainee positions in law etc, awarded to women only. Mr K a lawyer, sought compensation
- Q whether Dirs. 2000/78 + 2006/54 must be interpreted so that a person who was not seeking employment but merely the status of applicant to claim compensation, could fall within concept of “access to employment...”?

- CJEU: *inter alia* the objective of those Directives has not been achieved and,
- Mr K applied artificially for a post not to take it up but to obtain an undue advantage, this is for national court to decide.
- Where a person seeks only formal status of an applicant with sole purpose of seeking compensation, does not fall within definition of “access to employment...” and may possibly be considered an abuse of rights...paras. 43-44.

From *Mangold* to *Kucukdeveci* to *Rasmussen* Case C-C-441/14, 19 April 2016...evolution of the general principle

Mangold

- “Directive 2000/78 does not itself lay down the principle of equal treatment ...**the sole purpose of the directive** is 'to lay down a general framework for combating discrimination ...**the source of the actual principle underlying the prohibition of those forms of discrimination being found ... in various international instruments and in the constitutional traditions common to the Member States**”. Para. 74
- 75. The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.

➤ ***Mangold contd...***

- 78. “It is the responsibility of the national court to guarantee the **full effectiveness** of the general principle of non-discrimination in respect of age, **setting aside** any provision of national law which may conflict with Community law...”

***Kucukdeveci* Case C-555/07**

(legislation did not take account of work periods before age 25 for calculation of notice period)

- Dispute between private parties- **Q. 2** must a M State court dis-apply national law contrary to EU law or is the legitimate expectation of those subject to the law that national laws in force will be applied...to be taken into account, so that it will only become inapplicable after the Court of Justice has ruled on it or a substantially similar provision?

- CJEU - in order to answer whether there was a difference in treatment, it must first be ascertained whether the question should be examined by reference to primary EU Law or to Dir. 2000/78?
- CJEU: citing *Mangold*, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age... Dir. 2000/78 gives expression to that principle but added,
- 'It should be noted that Article 6(1) TEU provides that the **Charter of Fundamental Rights of the European Union** is to have the same legal basis as the Treaties. Under Article 21(1) of the charter "[a]ny discrimination based on ..age ...shall be prohibited'. Para. 21 but,

- It is the g.p. of EU law prohibiting **all** discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether EU law precludes national legislation...
- Para. 54 "...by reason of **the primacy of EU law**, which extends also to the principle of non-discrimination on grounds of age, contrary legislation which falls within the scope of EU law must be dis-applied.." (see *Mangold*, para. 77)
- It is for the national court to ensure the principle of non-discrimination on grounds of age ...is complied with, dis-applying if need be, any contrary provision of national law, **independently of whether it uses its entitlement...to ask the CJEU for a preliminary ruling on the interpretation of that principle** (para. 56)

Case C-441/14, *Rasmussen*, 19 April 2016

- Mr R dismissed by Ajos, age 60 after 25 years
- claimed 3 month's severance pay under Law on Salaried Employees (LSE) but,
- exception para.2a(3) no payment if employee receives state pension or, he receives old age pension from employer and joined the scheme before age 50. But Mr R found another job.
- [Note: CJEU in *Case C-499/08* had already decided that the principle of non-discrimination on grounds of age, as given expression in Dir. 2000/78 must be interpreted as precluding such a rule (as para.2a(3)), as workers who were **eligible** for a pension which they joined before age 50, could not claim severance pay on that ground alone.
- The rule prohibited **an entire category of workers** who wished to temporarily waive their right to a pension in exchange for severance, on basis of their age]

Rasmussen continued...

- Dispute between private parties, direct effect of Dir. 2000/78 not possible
- Q.1 for CJEU- in a dispute between private persons, whether the g.p. of non-d. age, precluded this law, regardless of whether the employee chose to retire or seek work?
- CJEU reiterated *Mangold & Kucukdevici* on source of g.p. of non-discrimination on grounds of age
- CJEU reiterated it's ruling in *Case C-499/08* but added that the g.p. of non-discrimination on grounds of age etc precluded such national legislation, "including in a dispute between private persons" & regardless of whether the employee chooses to remain in employment or to take his retirement

- Note: para. 26 “the same applies with regard to the fundamental principle of equal treatment, **the general principle prohibiting discrimination on grounds of age being merely a specific expression of that principle**”.
- Q.2 does EU law permit a national court, **in a dispute between private persons** where it is established that national law conflicts with g.p. of non-discrimination on grounds of age, to balance that principle against principles of **legal certainty and legitimate expectations** and allow latter to take precedence over former?
- No.
- A national court must interpret those provisions in line with the Directive or if this is not possible, must dis-apply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age.

- Neither the principles of **legal certainty and the protection of legitimate expectations** nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law, to bring proceedings to establish the **liability of the Member State** concerned for breach of EU law can alter that obligation.
- Important note para. 36. “Moreover, it is apparent from paragraph 47 of the judgment in *Association de médiation sociale* (C-176/12...) **that the principle prohibiting discrimination on grounds of age confers on private persons an individual right which they may invoke as such** and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle”.

Case C-176/12, *Association de médiation sociale* (concerned Article 27 EUCFR & Directive 2002/14/EC)

“In this connection, the facts of the case may be distinguished from those which gave rise to *Kucukdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself **to confer on individuals an individual right** which they may invoke as such” para.47.

Case C-258/15, *G.S. Sorondo*, 15 November 2016

- Mr S aged above 35 applied to police force in Autonomous Community of the Basque Country (ACBC) and claimed age limit of 35 infringed Dir. 2000/78 and Arts. 20 & 21 EUCFR
- CJEU there was a difference in treatment based directly on age (see also *Vital Perez* Case C416/13)
- Was it discrimination under Article 4(1) or 6(1)?
- The possession of particular physical capacities is one characteristic relating to age...and may be a GDOR under Art. 4(1) Dir. 2000/78.
- The objective of the age limit of 35 was to preserve the operational capacity of the police force of the ACBC and to ensure it functions properly and was a legitimate objective (see also *Vital Perez*)
- CJEU differentiated *V Perez* where age limit of 30 failed

- As duties of autonomous police forces differ from those of local police forces → operational duties + physical force *Versus* e.g. controlling traffic

Basque Police Academy produced evidence:

- operational performance of AC police decline after age 40 plus reduced recovery capacity and,
- a police officer over 55 years can no longer be considered in full possession of capabilities needed for proper performance of duties
- AC police officers qualify for reduction in working time from age 56 years and,
- Opportunity to retire from at age 59 or 60

- Evidence that by 2025, more than 50% of AC police officers would be 50-65 years old
- Need for gradual replacement of older officers
- Rational organisation → balance to be struck physically demanding posts for younger officers and less physically demanding posts for older officers
- CJEU → demanding eliminatory physical tests at recruitment would not be a less restrictive alternative as need to re-establish a satisfactory age pyramid → particular physical capacities should be envisaged not statically at time of recruitment but dynamically re-years of service
- Legislation not precluded by Art 2(2) & 4(1) so long as national court is satisfied **information is accurate**, and legislation is appropriate to objective... and, does not go beyond what is necessary to achieve objective

***Parris v Trinity College Dublin*, Case C-433/15, 24 November 2016**

- Mr P lecturer at TCD from 1972, joined o. pension scheme (OPS) and retired in 2010
 - OPS condition: only payable if member married or, entered a civil partnership before age 60
 - In 2009 aged 63, Mr P registered a civil partnership in the UK
 - In 2010 Civil Partnership Act enacted in Ireland and his c. partnership was recognised in Ireland in 2011
 - In 2010 he requested TCD that his civil partner should receive a survivor's pension on his death, request was rejected. Ultimately, Labour Court referred to CJEU
- Q. 1 & 2 was there direct or indirect discrimination on grounds of sexual orientation or age?
- No, at retirement he could not fulfil the condition due to state of national law at that time

- The wording of the rule was neutral excluded both spouses and civil partners
- CJEU there was a difference of treatment based on age but, did it fall within Art. 6(2)?
- No, the rule fixes an age for access to survivor's benefit and comes within Art. 6(2)
- Q. 3 whether Arts. 2 & 6(2) mean this rule is capable of creating discrimination **as a result of the combined effect of sexual orientation and age**, where it does not constitute discrimination on either ground in isolation?
- No-while discrimination may indeed be based on several of the grounds ...**there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established**".

Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law*, (European Union, Luxembourg, May 2016)

“..the report considers whether intersectional experiences can nevertheless be addressed within EU law....the **Court of Justice has repeatedly emphasized that it is not within its power to extend the grounds listed exhaustively in the Directives. The second possible way forward is to combine grounds within the existing list without seeing this as a new subgroup.** There is some support in the EU legislative framework for such an approach....**The third potential means ...is to take an expansive or ‘capacious view’ of existing grounds so that intersectional experiences can be addressed by acknowledging that even within a single ground, multiple intersecting power relations can be addressed”** p.10

- Intersectional discrimination – an issue for the future?

Time for coffee...

Budapest's Gerbeaud coffee house

